UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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JOHN T. FEY, Clerk

No. 15517

THEODORE WISNIEWSKI,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Certificate to the Supreme Court of the United States.

The United States Court of Appeals for the Eighth Circuit sitting at the City of St. Louis, Missouri on the 20th day of November, 1956, certifies that the record on file in the cause above entitled which is pending in this court on appeal from a judgment of conviction and sentence of the appellant rendered pursuant to jury verdict by the District Court for the District of Minnesota discloses:

That appellant is a retail on-sale liquor dealer in Minneapolis, Minnesota, who was tried, convicted and sentenced under an indictment which charged him with violations of a Regulation of the Secretary of Treasury, towit; 26 C.F.R. Section 175.121, 1952 Cumulative Pocket Supplement, in reusing marked liquor bottles for packaging of distilled spirits by increasing original contents thereof by adding liquid distilled spirits subject to taxation under internal revenue laws.

The case was before this court on a former appeal, reported at 225 F.2d 180 under the title, United States v. Goldberg. It was one of several cases which were submitted to this court together. Previous indictments against the same persons relating to violations of the same Regulation had been considered by Judge Nordbye and he had dismissed them for failure to state an offense, his opinion being reported at 123 F.Supp. 385. Thereafter, new indictments were presented in the same court against the same persons in respect to the same matter of refilling marked whiskey

bottles, and the defendants filed motions to dismiss them. Judge Joyce heard and sustained the motions against the new indictments and dismissed them for failure to state an offense. The former appeals to this court were taken by the government to reverse the judgments of dismissal entered by Judge Joyce. As to one of the cases (No. 8608), the indictment charged reuse of marked liquor bottles by increasing the contents by the addition of a substance, towit; water, and this court held (one judge dissenting) that the dismissal of that case was without error. As to the other cases where the indictments charged increasing the contents of marked liquor bottles by the addition of distilled spirits subject to taxation under internal revenue laws, this court held on the appeals that the district court erred in deciding that the indictments failed to state an offense and remanded the cases. Upon that remand a jury trial of the appellant was had and there was a judgment of conviction against him on two counts describing two separate acts of refilling. The pending appeal is to reverse that judgment.

The Regulation involved reads:

> "No liquor bottle or other authorized container shall be reused for the packaging of distilled spirits except as provided in Section 175.62, nor shall the original contents, or any portion of such original contents, remaining in a liquor bottle or other authorized container be increased by the addition of any substance." (The exceptions noted in Section 175.62 are not pertinent here.)

The indictments which were considered by Judge Nordbye were cast in the terms of the Regulation and contained the allegation that defendants wilfully and unlawfully reused marked liquor bottles "and increased the original contents of said marked liquor bottles by the addition of a substance," and Judge Nordbye cited United States v. Graf Distilling Co., 208 U.S. 198, in holding, 123 F.Supp. at 388, that the Secretary did not intend that the addition of any type of soluble substance to the contents of a marked liquor bottle should be subject to prosecution as a crime

against the revenue.

The corresponding wording of the new indictment on which appellant's conviction rests is "by the addition of a substance, towit; liquid distilled spirits subject to taxation under the Internal Revenue Laws of the United States."

It was proved and undisputed on the jury trial of appellant that the substance added to the marked liquor bottles at appellant's tavern was fully tax paid whiskey, and the court instructed the jury to convict if convinced "that defendant did wilfully reuse two marked liquor bottles which bottles had blown on the shoulder the words, 'Federal law forbids sale or reuse of this bottle,' and which bottles originally contained 'Seagram's 7-Crown Blended Whiskey,' and thereafter the contents were increased by distilled spirits from another marked liquor bottle, * * *." The court also instructed that "the fact that the government was not deprived of any revenue or tax is no defense."

At its December term, 1905, this court certified to the Supreme Court two questions which arose in Case No. 2233, United States v. Graf Distilling Company, concerning the interpretation of Section 3455, Revised Statutes. The relevant part of that section read:

> "Whenever any person sells any barrels * * * marked * * * so as to show * * * that the tax thereon has been paid * * * said barrel * * * containing anything else than the contents which were therein when said liquor had been so lawfully * * * marked by an officer of the revenue, he shall be liable, etc."

The certificate of this court stated that it was indispensable to a correct determination of the causes before it to properly decide the issue of law upon the question:

> "2. Does the phrase 'anything else' as employed in Section 3455 of the Revised Statutes include substances that are not in themselves taxable under the laws of the United States?"

To which the Supreme Court answered, "No." 208 U.S. 198, l.c. 208. The Supreme Court stated in its opinion (at pages 203 and 204):

"the original averment (of certain informations) as to placing other distilled spirits in the barrels after being stamped is not before us."

In the case now before this court, the appellant contends that no offense was proved against him because the whiskey added to the marked bottles was fully tax paid.

The Court of Appeals for the Eighth Circuit therefore certifies that the following question of law is presented on the appeal pending before it and decision thereof is indispensable to a correct determination of the cause and to the end that this court may properly decide the issue of law presented, it desires the instruction of the Supreme Court upon the following question:

"Does the phrase "any substance" as employed in 26 C.F.R. Section 175.121, 1952 Cumulative Pocket Supplement, include tax paid distilled spirits?"

Archibald K. Gardner, Chief Judge.

Joseph K. Woodrough, Circuit Judge.

December 4, 1956.

Charles J. Vogel, Circuit Judge.

Judges of the United State Court of Appeals for the Eighth Circuit.

Filed December 4, 1956.
E. E. Koch, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of Theodore Wisniewski, Appellant, vs. United States of America, Appellee, No. 15517, September Term, 1956, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 4th day of December, A. D. 1956.

E. E. Koch

Clerk of the United States Court
of Appeals for the Eighth Circuit.